NO. 48710-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GREGORY WRIGHT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to establish the charge of first degree kidnapping.

2. This Court should exercise its discretion to deny appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. Where the State presented no evidence that appellant restrained the victim by secreting her in a place she was unlikely to be found or by the use or threatened use of deadly force, must his conviction of first degree kidnapping be reversed?

2. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

1. Procedural History

On January 16, 2015, the Clark County Prosecuting Attorney charged appellant Gregory Wright with first degree kidnapping and second degree assault. CP 1-2; RCW 9A.40.020(1); RCW 9A.36.021(1)(g). The assault charge was later amended to attempted second degree assault. CP 100-01; RCW 9A.28.020(3)(c). The case

proceeded to jury trial before the Honorable Scott A. Collier, and the jury returned guilty verdicts. CP 183, 186. The jury found that the kidnapping was committed to facilitate second degree assault or flight thereafter. CP 188. The court imposed a standard range sentence of 186 months with 36 months community custody. CP 199-200. The court found Wright indigent and not likely to be able to pay financial obligations in the future. CP 199. It waived all non-mandatory fines and fees. CP 201. Wright filed this timely appeal. CP 212.

2. Substantive Facts

Gregory Wright was charged with first degree kidnapping and attempted second degree assault based on an incident that occurred in a mental health examination room at the Clark County Jail. The room was located in the medical unit, about 10 to 15 feet from a rover station where numerous corrections officers worked. RP 400. There was also an office directly across from the exam room for the corrections officer on duty for the medical unit. RP 317-18, 412. The rover station had a big window so that the guards could look out over the whole area. RP 318. It was standard practice for the door to the exam room to be kept open while inmates met with mental health professionals. RP 315, 442. A closed door would catch the officers' attention. RP 366, 401, 413.

On January 13, 2015, Wright was in the exam room with Kristina Nystrom, a mental health therapist who worked at the jail, when corrections officers heard screaming. RP 308-09, 316, 364. There were four or five corrections officers in the rover station, and they immediately responded to the screams. RP 363-65, 415. Within about 15 seconds, officers had Wright restrained. RP 370-74, 377.

Nystrom testified that she spoke to Wright in the exam room for ten to 15 minutes. RP 322. She gave him suggestions for dealing with stress, and then Wright then suddenly stood up and asked what she could do for him. RP 324. She thought Wright was going to leave, but instead he kicked out the door stop, pushed the door shut, and hit her in the face. RP 325. Nystrom fell backwards and landed on the floor. RP 326. She wanted to get out of the room, but Wright was standing between her and the door. RP 326. When she pushed herself up, Wright put probably one, but possibly two hands on her neck. RP 327, 337-38. Nystrom squirmed away, and Wright's hand disengaged. RP 327, 341. Nystrom testified that she had never said she was strangled, her airway was not cut off, and she could not say that was Wright's intent. RP 339. After she wriggled away from Wright's hand, Wright tried moving the desk in front of the door, but he was not able to block the door because Nystrom threw herself against the desk. RP 327, 338. Wright grabbed the neck of Nystrom's sweater

and tried to pull her over the desk, but again he was unsuccessful. RP 328. During the entire incident Nystrom was screaming loudly to get the guards to come, and they responded within seconds. RP 328-29, 348.

Following the incident Nystrom had minor injuries to her finger, elbow, and shin. She complained of pain to her face, but there were no visible injuries that night. RP 492-93. There was also a little bruise on one side of her neck. RP 546. Photos taken the next day showed a bruise above her jaw near the corner of her mouth. RP 678-79.

Wright spoke to a detective from the Sheriff's office after the incident. RP 660. He said he did not remember what happened in the exam room after he stood up to walk out. RP 956. He did not remember the door to the exam room being closed. RP 963. He said he never intended to hurt Nystrom. RP 966. Wright did not say Nystrom was lying, but he did not remember doing the things she said he did. RP 966-67.

C. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH FIRST DEGREE KIDNAPPING, AND WRIGHT'S CONVICTION MUST BE REVERSED.

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct.

1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Wright was convicted of first degree kidnapping by intentionally abducting Nystrom with the intent to facilitate a felony or flight thereafter. CP 100, 183, 188; RCW 9A.40.020(1)(b). To establish that Wright abducted Nystrom, the State had to prove he restrained her "by either (a) secreting or holding ... her in a place where ... she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1). While there was evidence that Wright restrained Nystrom when he closed the door to the exam room and attempted to block it with the desk[1], the evidence did not establish that the restraint was by means constituting abduction.

[1] "'Restrain' means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he or she is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or

This Court found sufficient evidence of abduction in State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004). In that case, although the victim's car was outside the defendant's house and visible to the public, the evidence showed she was secreted in a place she was unlikely to be found because she was placed in leg shackles and handcuffs and her mouth was taped shut, and she was in private home where the public had no access to her and was not able to come to her aid. Sanders, 120 Wn. App. at 816.

Here, by contrast, the incident charged as kidnapping occurred in a medical exam room in the Clark County Jail. Corrections officers delivered Wright to the room and thus knew he was there with Nystrom, who worked at the jail. The room was approximately 15 feet from a rover station where numerous correctional officers were stationed to monitor the medical unit. Officers could see the hallway and walked past the exam room frequently. As a rule, the door to the exam room was kept open, so that a closed door would immediately draw the officers' attention. Under these circumstances, the State failed to prove Wright secreted or held Nystrom in a place she was not likely to be found. Indeed, the evidence shows that she was found within seconds of Wright closing the door.

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institution having lawful control or custody of him or her has not acquiesced." RCW 9A.40.010(6).

The evidence also fails to establish that Wright restrained Nystrom by use or threatened use of deadly force. The court defined deadly force for the jury as "force which is the intentional application of force through the use of firearms or any other means reasonably likely to cause death or serious physical injury." CP 162; see State v. Majors, 82 Wn. App. 843, 846, 919 P.2d 1258 (1996). No firearm was involved in this case. Nor was there evidence that Wright used force reasonably likely to cause death or serious physical injury. Nystrom testified that Wright punched her and put his hand on her neck, but she sustained only minor injuries consisting of scrapes and bruises. Moreover, she was able to wriggle away from Wright so that his hand disengaged, and her airway was never constricted. The evidence also failed to establish any threat to use deadly force. The entire incident lasted less than one minute. Nystrom did not testify to any threat, and she said she did not know Wright's intent.

The State failed to present evidence that Wright abducted Nystrom, rather than merely restraining her. His conviction for first degree kidnapping must therefore be reversed and the charge dismissed.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO IMPOSE APPELLATE COSTS.

The trial court entered an order of indigency finding that Wright was entitled to seek appellate review wholly at public expense, including

appointed counsel, filing fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 214-16. In addition, the trial court found Wright was unlikely to have the ability to pay LFOs in the future and imposed only the mandatory LFOs. CP 199.

a. **The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.**

Our supreme court in Blazina recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf; KATHERINE A.

BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The Blazina court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that Blazina held was essential before including monetary obligations in the judgment and sentence.

Wright has been determined to qualify for indigent defense services on appeal. To require him to pay appellate costs without determining his financial circumstances would transform the thoughtful and independent judiciary to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. Blazina,

182 Wn.2d at 836; see also RCW 10.82.090(1) ("[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments."). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, "Mahone cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State's ripeness claim that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect." Blazina, 182 Wn.2d at 832, n.1. Blank's questionable foundation has been thoroughly undermined by the Blazina court's exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to "look to the comment in GR 34 for guidance." Blazina, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority

to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The Blazina court also suggested, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. This court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Blank, too, acknowledged appellate courts have discretion to deny the State's requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State's requests for appellate costs in appeals involving indigent appellants, barring reasonable

efforts by the State to rebut the presumption of continued indigency. Wright respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

b. **Alternatively, this court should remand for superior court fact-finding to determine Wright's ability to pay**.

In the event this court is inclined to impose appellate costs on Wright should the State substantially prevail on appeal, he requests remand for a fair pre-imposition fact-finding hearing at which he can present evidence of his inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. At any such hearing, this court should direct the superior court to appoint counsel for Wright to assist him in developing a record and litigating his ability to pay.

If the State is able to overcome the presumption of continued indigence and support a finding that Wright has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion of the State's requested costs, depending on his actual and documented ability to pay.

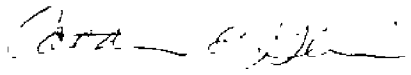
D. CONCLUSION

The State failed to prove an essential element of the kidnapping charge, and Wright's conviction must be reversed and the charge

dismissed. Moreover, this Court should exercise its discretion not to impose appellate costs should the State substantially prevail on appeal.

DATED September 27, 2016.

Respectfully submitted,



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Catherine E. Glinski
Done in Port Orchard, WA
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